Nos. 19753-4-5

In the

United States Court of Appeals

For the Ninth Circuit

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,

Appellant,

vs.

OLIVER J. OLSON & CO., a corporation, and MARINE LEOPARD CARGO,

Appellees.

MARINE LEOPARD CARGO,

Appellant,

vs.

OLIVER J. OLSON & CO., a corporation, and LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,

Appellees.

Petition for Rehearing

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TABLE OF AUTHORITIES CITED

Texts

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1. We had thought that the decision of this court in the *President Madison*[1] placed this circuit beyond the scholar's criticisms of many judicial valuations, since it recognized expressly the basic underlying rationale of the market value test. Market value appraisal based on sale prices is not and should not be a theoretical abstraction. There should be a rational basis for its use or its rejection. The rationale is set forth in *Bonbright Valuation of Property,* Vol. 1, page 91 (a text cited by all parties to this litigation):

> "Indeed, the most plausible defense of market value as the usual measure of compensation under the laws of damages and of eminent domain is that it is often the best available measure of value to the owner.
>
> "* * *.
>
> "Net market value not only often sets the lower limit of value to the owner. It may also set an upper limit if it represents the price at which the owner could replace his property with an equally desirable substitute."

The same is stated as Hornbook principle in *McCormick on Damages,* § 45, page 173:

> "True it is that articles of commerce destined for sale must be appraised, to measure loss through conversion or breach of contract, by the market prices at which such articles are bought and sold. The reason for the rule is this: the loser of the article, if awarded the prevailing price therefor, may enter the market and, with the sum awarded, replace the article lost with a substitute identical in kind and quality."

The traditional Admiralty damage principle of *restitutio in integrum* has always been thought to require valuation in accordance with these principles and our former reading of the *President Madison.* See, *Roscoe on Damages in Marine Collisions,* 3rd Ed., 1929, Chapter 2.

The court's citation of real property condemnation cases in support of its decision on ship valuation is inapposite. The law

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1. 91 F.2d 835 (9th Cir. 1937).

has always presumed that the earning power of land is replaceable and many special doctrines have been used to supplement market sales prices to appraise "loss to the owner" of real property. Furthermore, land can because of its nature never be evaluated by reference to reproduction. Productive machinery on the other hand is usually evaluated this way unless it is common enough that contemporaneous sales prices establish its replacement value to the owner. Even in real property cases under the law of eminent domain the law has not reached the point reached by the court in the present case. See, *Orgel on Valuation Under Eminent Domain,* Volume 1, page 174:

> "We are therefore forced to the conclusion that market value, strictly interpreted as meaning probable sale price, cannot be defended as even an approximate measure of value to the owner in most of those cases which actually arise under the law of eminent domain. It is hardly necessary to add, however, that the courts do not accept market value, so interpreted, as the invariable measure of compensation."

We strenuously urge the court to reconsider its overruling of the District Court on this point and ordering appraisal on the basis of probable sale price of the vessel. The District Court followed both reason and authority in rejecting sale prices in a market that was not a replacement market and finding no relevant market since Olson was statutorily prohibited from buying in the only existing market of similar vessels. The present case presents almost a classic instance for resort to valuation on the basis of reproduction depreciated to determine the fair estimate of the loss to the owner as was done in *Standard Oil Co. v. Southern Pacific Co.,* 268 U.S. 146.[2]

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2. This case is cited to support the court's present opinion as if it were contrary to the former decision in the *President Madison* and the decision of the District Court in this case. We submit that this is a mis-citation since the *Supreme Court* in Southern Pacific found no market in which the vessel could be sold *or* bought and sustained reproduction depreciated valuation.

This court may have misconceived the argument in support of of the District Court's valuation. No counsel meant to suggest that coastwise privileges had a true market value (Opinion p. 7). All concede they had none because no one was able to prove a coastwise market due to the fact that (as the record shows) coastwise sea trade had been rendered substantially non-existent by rail competition except for the Olson Company's specialized lumber trade on this coast.

2. By sanctioning "payment" instead of "liability" as determinative of a limiting vessel's claim against the non-limiting vessel, the court has approved a factor which can be unilaterally and capriciously determined by a party to the case and not by law. Limitation of liability pursuant to 46 U.S. Code § 183 is a defense that can be waived and need not be raised at all by a shipowner. The court's decision has made it possible in future cases for a shipowner with questionable limitation rights to compromise the issue by "payment" of third party claims primarily at the expense of the other vessel involved in the collision. This ruling invites chicanery and subterfuge.

3. Inclusion of cargo liability without regard to limitation until after the balance is struck will always result in the non-limiting vessel bearing one-half of the total losses and this is the only way such result can be uniformly accomplished. In no instance other than a fact finding on remand of *Howard Olson* value equivalent to or less than *Marine Leopard* damage will Luckenbach bear losses equal to those borne by Olson in this case. By implying that such a fact finding may or should be made on remand, the court evades the legal issue presented, namely, does the law require that the limitation rights of Olson be used to reduce the liability that would otherwise fall on Luckenbach in a *Chattahoochee*[3] division of damages, with the result in most instances that equally blameworthy Luckenbach bears less loss than the limiting Olson Co., all to the prejudice of cargo owners who are blameless.

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3. 173 U.S. 540 (1899).

4. The court's opinion has also evaded the interest point by again assuming there may ultimately be no offset payment. The point is that interest does not run on the balance due as the court assumes, interest runs on all damages of both vessel owners. The same money result is reached but the distinction is important particularly with relation to the matter of interest on General Average disbursements. Interest on GA disbursements cannot be distinguished on the basis put by the court, viz., that it is payment for the use of money. All interest allowances in Admiralty are on this basis. For instance, a disbursement for temporary repairs to the vessel is contributed to by cargo in general average. The court has held that for the loss of use of this money Luckenbach received 5 + 7 or 12% to the date cargo first reimbursed the shipowner, compounded at 7% thereafter on the basis of a case that held the shipowner was entitled to 5% to the date of reimbursement. Interest should be allowed on all disbursements and damages at the same rate in accordance with the later cases from the Second Circuit and the uniform practice of this circuit.

SUGGESTION FOR REHEARING EN BANC

The decision of this court on division of damages in a limitation case is a matter of first impression, i.e., there are no reported decisions holding on the exact point presented by this case.[4] The reason for this court's decision is directly contrary to the holding of the Supreme Court in the *Chattahooche*[5] and the holding of this court is directly contrary to the reasoning of the Supreme Court in the *North Star*.[6]

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4. The opinion in the *George W. Roby,* 111 Fed. 601 (6th Cir., 1901) applies limitation after division of damages in the manner contended for by cargo in this case. However, it is apparently true as suggested by Luckenbach that the same dollar result could have been reached in that case on Luckenbach's theory.

5. 173 U.S. 540 (1899).

6. 106 U.S. 17 (1882).

It should also be noted that there has not been cited by any counsel a single case valuing a vessel (or other commercial machinery) on the basis of sales prices of vessels that the subject owner could not legally have purchased. The instruction on remand involves a departure from all precedent.

We respectfully suggest that in view of the novel questions presented, rehearing by the full court is eminently appropriate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this Petition I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and in my judgment the Petition is well founded and it is not interposed for delay.

Norman B. Richards